IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. PETER GARDUNO, Petitioner.	)	2 CA-CR 2006-0357-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20012019

Honorable Richard Nichols, Judge

REVIEW GRANTED; RELIEF DENIED

Peter Garduno — Phoenix
In Propria Persona

B R A M M E R, Judge.

¶1 Petitioner Peter Garduno was convicted after a jury trial of aggravated driving under the influence of an intoxicant and aggravated driving with an alcohol concentration of .10 or greater, both while his license was suspended or revoked. The trial court found he had two prior felony convictions and sentenced Garduno to concurrent, presumptive prison terms of ten years on each count. This court affirmed the convictions and sentences on

appeal. *State v. Garduno*, No. 2 CA-CR 2002-0327 (memorandum decision filed June 27, 2003). This court also granted Garduno's petition for review of the trial court's order denying post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S., but denied relief. *State v. Garduno*, No. 2 CA-CR 2004-0272-PR (decision order filed Apr. 19, 2005). In this petition for review, Garduno challenges the trial court's order denying relief on claims Garduno raised in his second petition for post-conviction relief. We conclude that Garduno has not sustained his burden of establishing the trial court abused its discretion. *See State v. Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986) (appellate court will not disturb trial court's ruling on post-conviction petition absent abuse of discretion).

¶2 As we noted in our decision order denying relief in the first Rule 32 proceeding, Garduno had, in a summary fashion, sought relief from his sentences based on the holdings in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000), and *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004). Noting the court had imposed presumptive prison terms, we denied relief on the ground that the presumptive terms were the statutory maximum for the offenses and that neither case afforded Garduno relief. In this proceeding, albeit in his notice of post-conviction relief and only cursorily in one of his two petitions, Garduno sought relief based on the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738 (2005). This and related claims are precluded to the extent they are mere permutations of the claim Garduno raised in the first post-conviction proceeding. *See* Ariz. R. Crim. P. 32.2. Nor has Garduno established that *Booker*, which

addressed the constitutionality of mandatory federal guidelines that did not apply to Garduno's case, 543 U.S. at 226, 125 S. Ct. at 746, was a significant change in the law that would entitle him to relief under Rule 32.1(g). Therefore, the court's implicit denial of relief on this claim was correct.

¶3 In his petition, Garduno also raised a claim of newly discovered evidence pursuant to Rule 32.1(e). The claim was based on purportedly new evidence that the blood-testing kit used in his case was outdated or expired, and Garduno argued the test results should not have been admitted at trial. Rejecting that claim, the trial court stated it was "not a ground for relief listed in Rule 32.1. In particular, if arguably it falls under section 'h', the Court finds that the defendant has not met that section's requirements." Garduno reasserts that claim on review. But he has not shown the court abused its discretion in denying relief. *See State v. Sanchez*, 200 Ariz. 163, ¶ 10, 24 P.3d 610, 613 (App. 2001).

¶4 In his petition for review, Garduno admits knowing there was purportedly something wrong with what he refers to as the "blood kit." He states: "[H]alf way through the trial I learned the blood kit used to convict me was unwarranted/expired and pulled out [of] the . . . trunk of the patrol car in the summer of June 10th 2000." This could not, by definition, have been newly discovered evidence. *See* Ariz. R. Crim. P. 32.1(e); *State v. Bilke*, 162 Ariz. 51, 52, 781 P.2d 28, 29 (1989) ("[T]he evidence must appear on its face to have existed at the time of trial but be discovered after trial."). Nor was it a claim of actual innocence because Garduno has not shown "by clear and convincing evidence that

the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would have found [him] guilty." Ariz. R. Crim. P. 32.1(h). The trial court was correct, and we adopt its ruling. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993)

¶5 Additionally, it appears that some of Garduno's assertions in the petition for review are, in actuality, entirely new claims. We will not address claims raised for the first time in a petition for review. *See generally* Ariz. R. Crim. P. 32.9. And, to the extent Garduno's general challenges to the fairness of his trial were raised in the trial court in this proceeding, such claims, including challenges to the sentences, are precluded by Garduno's failure to raise the claims on appeal or in his first Rule 32 proceeding. *See* Ariz. R. Crim. P. 32.2. Garduno's suggestion that trial counsel was ineffective is an example of a precluded claim, Garduno having raised claims of ineffective assistance of counsel in the first post-conviction proceeding.

¶6 The trial court did not abuse its discretion in dismissing Garduno's petition for post-conviction relief and denying his motion for rehearing. Consequently, we grant the petition for review but deny relief.

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J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

PHILIP G. ESPINOSA, Judge